statistical evidence regarding: (i) the disparity between the number of prime contracts awarded by the city to minorities during the years 1978-83 (less than one percent) and the city's minority population (fifty percent), and (ii) the extremely low number of MBEs that were members of local contractors' trade associations. The Court found that this evidence was insufficient. It said that more probative evidence would have compared, on the one hand, the number of qualified MBEs in the local labor market with, on the other hand, the number of city contracts awarded to MBEs and the number of MBEs in the local contractors' associations.

In Adarand, Justice O'Connor's opinion noted that "racial discrimination against minority groups in this country is an unfortunate reality," and as an example, it pointed to the "pervasive, systematic, and obstinate discriminatory conduct" that underpinned the court-ordered affirmative action measures that were upheld in United States v. Paradise, 480 U.S. 149 (1987). 63 U.S.L.W. at 4533 (internal quotations omitted).[21] Her opinion did not say, however, that only overwhelming evidence of the sort at issue in Paradise can justify affirmative action. Again, Croson indicates that what is required is a "strong basis in evidence" to support the government's conclusion that race-based remedial action is warranted, and that such evidence need only approach a prima facie showing of discrimination against minorities. 488 U.S. at 500. The factual predicate in Paradise plainly exceeded a prima facie showing. Post-Croson lower court decisions support the conclusion that the requisite factual predicate for race-based remedial action does not have to rise to the level of discrimination in Paradise.

The Court in Croson left open the question whether a government may introduce statistical evidence showing that the pool of qualified minorities would have been larger "but for" the discrimination that is to be remedied. Post-Croson lower court decisions have indicated that such evidence can be probative of discrimination.[22]

Croson also did not discuss the weight to be given to anecdotal evidence of discrimination that a government gathers through complaints filed with it by minorities or through testimony in public hearings. Richmond had relied on such evidence as additional

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[21] The measures at issue in Paradise were intended to remedy discrimination by the Alabama Department of Public Safety, which had not hired a black trooper at any rank for four decades, 480 U.S. at 168 (plurality opinion), and then when blacks finally entered the department, had consistently refused to promote blacks to the upper ranks. Id. at 169-71.

[22] See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1008 (3d Cir. 1993); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992); cf. Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1415 (9th Cir. 1991) (government had evidence that an "old-boy network" in the local construction industry had precluded minority businesses from breaking into the mainstream of "qualified" public contractors).

support for its MBE plan, but the Court discounted it. Post-Croson lower court cases, however, have said that anecdotal evidence can buttress statistical proof of discrimination.[23]

In addition, Croson did not discuss which party has the ultimate burden of persuasion as to the constitutionality of an affirmative action program when it is challenged in court. Prior to Croson, the Supreme Court had spelled out the following evidentiary rule: while the entity defending a remedial affirmative action measure bears the initial burden of production to show that the measures are supported by "a strong basis in evidence," the "ultimate burden" of proof rests upon those challenging the measure to demonstrate that it is unconstitutional. Wygant, 476 U.S. at 277-78 (plurality opinion).[24] Lower courts consistently have said that nothing in Croson disturbs this evidentiary rule.[25]

Finally, and perhaps most significantly, Croson did not resolve whether a government must have sufficient evidence of discrimination at hand before it adopts a racial classification, or whether "post-hoc" evidence of discrimination may be used to justify the classification at a later date -- for example, when it is challenged in litigation. The Court did say that governments must "identify [past] discrimination with some specificity before they may use race-conscious relief." 488 U.S. at 504. However, every court of appeals to consider the question has allowed governments to use "post-enactment" evidence to justify affirmative action -- that is, evidence that the government did not consider when adopting a race-based remedial measure, but that nevertheless reflects evidence of discrimination providing support for the determination that remedial action was warranted at the time of adoption.[26] Those

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[23] See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1002-03 (while anecdotal evidence of discrimination alone rarely will satisfy the Croson requirements, it can place important gloss on statistical evidence of discrimination); Coral Constr Co. v. King County, 941 F.2d at 919 ("[t]he combination of convincing anecdotal and statistical evidence is potent;" anecdotal evidence can bring "cold numbers to life"); Cone Corp. v. Hillsborough County, 908 F.2d at 916 (testimonial evidence adduced by county in developing MBE program, combined with gross statistical disparities in minority participation in public contracting, provided "more than enough evidence on the question of prior discrimination and need for racial classification").

[24] See also Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (when the government "introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the [government] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [challengers] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored'").

[25] See, e.g., Concrete Works v. City and County of Denver, 36 F.3d at 1521-22; Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1005; Cone Corp. v. Hillsborough County, 908 F.2d at 916.

[26] See Concrete Works v. City & County of Denver, 36 F.3d at 1521; Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1004); Coral Constr. Co. v. King County, 941 F.2d at 920. As the Second Circuit put it when permitting a state government to rely on post-enactment evidence to defend a race-

courts have interpreted Croson as requiring that a government have some evidence of discrimination prior to embarking on remedial race-conscious action, but not that it marshal all such evidence at that time.[27]

2. Nonremedial Objectives

Because Richmond defended its MBE program on remedial grounds, the Court in Croson did not explicitly address if and when affirmative action may be adopted for "nonremedial" objectives, such as promoting racial diversity and inclusion. The same is true of the majority opinion in Adarand, since the program at issue in that case also is said to be remedial. In his Adarand dissent, Justice Stevens said that the majority's silence on the question does not foreclose the use of affirmative action to serve nonremedial ends. 63 U.S.L.W. at 4539 (Stevens, J., dissenting). Thus, in the wake of Croson and Adarand, there are substantial questions as to whether and in what settings nonremedial objectives can constitute a compelling interest.[28]

To date, there has never been a majority opinion for the Supreme Court that addresses the question. The closest the Court has come in that regard is Justice Powell's

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based contracting measure, "[t]he law is plain that the constitutional sufficiency of . . . proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment." Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992).

[27] See Concrete Works v. City and County of Denver, 36 F.3d at 1521 ("Absent any preenactment evidence of discrimination, a municipality would be unable to satisfy Croson. However, we do not read Croson's evidentiary requirement as foreclosing the consideration of post-enactment evidence."); Coral Constr. Co. v. King County, 941 F.2d at 920 (requirement that municipality have "some evidence" of discrimination before engaging in race-conscious action "does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Rather, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the [program]."). One court has observed that the "risk of insincerity associated with post-enactment evidence . . . is minimized" where the evidence "consists essentially of an evaluation and re-ordering of [the] pre-enactment evidence" on which a government expressly relied in formulating its program. Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1004. Application of the post-enactment evidence rule in that case essentially gave the government a period of transition in which to build an evidentiary foundation for an affirmative action program that was adopted before Croson, and thus without reference to the Croson requirements. In Coral Construction, the Ninth Circuit permitted the government to introduce post-enactment evidence to provide further factual support for a program that had been adopted after Croson, with the Croson standards in mind. See Coral Constr. Co. v. King County, 941 F.2d at 914-15, 919-20.

[28] Given the nation's history of discrimination, virtually all affirmative action can be considered remedial in a broad sense. But as Croson makes plain, that history, on its own, cannot properly form the basis of a remedial affirmative action measure under strict scrutiny.

separate opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), which said that a university has a compelling interest in taking the race of applicants into account in its admissions process in order to foster greater diversity among the student body.[29] According to Justice Powell, this would bring a wider range of perspectives to the campus, and in turn, would contribute to a more robust exchange of ideas – which Justice Powell said was the central mission of higher education and in keeping with the time-honored First Amendment value in academic freedom. See id. at 311-14.[30] Since Bakke, Justice Stevens has been the most forceful advocate on the Court for nonremedial affirmative action measures. He has consistently argued that affirmative action makes just as much sense when it promotes an interest in creating a more inclusive and diverse society for today and the future, as when it serves an interest in remedying past wrongs. See Adarand, 63 U.S.L.W. at 4539 (Stevens, J., dissenting); Croson, 488 U.S. at 511-12 & n.1 (Stevens, J., concurring); Johnson v. Transportation Agency, 480 U.S. 616, 646-47 (1987) (Stevens, J., concurring); Wygant, 476 U.S. at 313-15 (Stevens, J., dissenting). As a circuit judge in a case involving an ostensibly remedial affirmative action measure, Justice Ginsburg announced her agreement with Justice Stevens' position "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified." O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (citing Justice Stevens' concurrence in Croson, 488 U.S. at 511).

In Metro Broadcasting, the majority relied on Bakke and Justice Stevens' vision of affirmative action to uphold FCC affirmative action programs in the licensing of broadcasters on nonremedial grounds; the Court said that diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation's radio and television airwaves. 497 U.S. at 567-68. The Court reached that conclusion under intermediate scrutiny, however, and thus did not hold that the governmental interest in seeking diversity in broadcasting is "compelling." Adarand did not overrule the result in Metro Broadcasting – a point not lost on Justice Stevens. See Adarand, 63 U.S.L.W. at 4539 (Stevens, J., dissenting) ("The majority today overrules Metro Broadcasting only insofar as it" is inconsistent with the holding that federal affirmative action measures are subject to strict scrutiny. "The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is not inconsistent with the Court's holding today – indeed, the question is not remotely presented in this case . . . .").

On the other hand, portions of Justice O'Connor's opinion in Croson and her dissenting opinion in Metro Broadcasting appear to cast doubt on the validity of nonremedial

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[29] Although Justice Powell wrote for himself in Bakke, his opinion was the controlling one in the case.

[30] Although it apparently has not been tested to any significant degree in the courts, Justice Powell's thesis may carry over to the selection of university faculty: the greater the racial and ethnic diversity of the professors, the greater the array of perspectives to which the students would be exposed.

affirmative action programs. In one passage in her opinion in Croson, Justice O'Connor stated that affirmative action must be "strictly reserved for the remedial setting." Id. at 493 (plurality opinion). Echoing that theme in her dissenting opinion (joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) in Metro Broadcasting, Justice O'Connor urged the adoption of strict scrutiny for federal affirmative action measures, and asserted that under that standard, only one interest has been "recognized" as compelling enough to justify racial classifications: "remedying the effects of racial discrimination." 497 U.S. at 612. Justice Kennedy's separate dissent in Metro Broadcasting was also quite dismissive of non-remedial justifications for affirmative action; he criticized the majority opinion for "allow[ing] the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination"). Id. at 632 (Kennedy, J., dissenting).

Nowhere in her Croson and Metro Broadcasting opinions did Justice O'Connor expressly disavow Justice Powell's opinion in Bakke. Accordingly, lower courts have assumed that Justice O'Connor did not intend to discard Bakke.[31] That proposition is supported by Justice O'Connor's own concurring opinion in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), in which she expressed approval of Justice Powell's view that fostering racial and ethnic diversity in higher education is a compelling interest. Id. at 286. Furthermore, in Wygant, Justice O'Connor said that there might be governmental interests other than remedying discrimination and promoting diversity in higher education that might be sufficiently compelling to support affirmative action. Id. For example, Justice O'Connor left open the possibility that promoting racial diversity among the faculty at primary and secondary schools could count as a compelling interest. Id. at 288 n*. In his Wygant dissent, Justice Stevens argued that this is a permissible basis for affirmative action. Id. at 313-15 (Stevens, J., dissenting).

On the assumption that Bakke remains the law, it is clear that to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself.[32] As Bakke teaches, in higher education, that asserted goal is the enrichment of the academic experience. And according to

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[31] See Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 353-54 (D.C. Cir. 1989), aff'd sub. nom. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Winter Park, 873 F.2d at 357 (Williams, J., concurring in part and dissenting in part); Shurberg Broadcasting, Inc. v. FCC, 876 F.2d 902, 942 (D.C. Cir. 1989) (Wald, C.J., dissenting), aff'd sub. nom. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). In Davis v. Halpern, 768 F. Supp. 968 (S.D.N.Y. 1991), the court reviewed the law of affirmative action in the wake of Croson and Metro Broadcasting, and, citing Justice Powell's opinion in Bakke, said that a university has a compelling interest in seeking to increase the diversity of its student body. Id. at 981. See also United States v. Board of Educ. Township of Piscataway, 832 F. Supp. 836, 847-48 (D.N.J. 1993) (under constitutional standards for affirmative action, diversity in higher education is a compelling governmental interest) (citing Bakke and Croson).

[32] The Court has consistently rejected "racial balancing" as a goal of affirmative action. See Croson, 488 U.S. at 507; Johnson, 480 U.S. at 639; Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 475-(1986) (plurality opinion); Bakke, 438 U.S. at 307 (opinion of Powell, J.).

the majority in Metro Broadcasting, the asserted independent goal that justifies diversifying the owners of broadcast licenses is adding variety to the perspectives that are communicated in radio and television. That same kind of analysis must be applied to efforts to promote racial and ethnic diversity in other settings.

For instance, diversification of the ranks in a law enforcement agency arguably serves vital public safety and operational needs, and thus enhances the agency's ability to carry out its functions effectively. See Wygant, 476 U.S. at 314 (Stevens, J., dissenting) ("[I]n law enforcement . . . in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites."); Paradise, 480 U.S. at 167 n.18 (plurality opinion) (noting argument that race-conscious hiring can "restore[] community trust in the fairness of law enforcement and facilitate[] effective police service by encouraging citizen cooperation").[33] It is more difficult to identify any independent goal that may be attained by diversifying the racial mix of public contractors. Justice Stevens concurred in the judgment in Croson on precisely that ground. Citing his own Wygant dissent, Justice Stevens contrasted the "educational benefits to the entire student body" that he said could be achieved through faculty diversity with the minimal societal benefits (other than remedying past discrimination, a predicate that he said was not supported by the evidence in Croson) that would flow from a diversification of the contractors with whom a municipality does business. See Croson, 488 U.S. at 512-13 (Stevens, J., concurring in part and concurring in the judgment). Furthermore, the Court has stated that the desire to develop a growing class of successful minority entrepreneurs to serve as "role models" in the minority community is not, on its own, a valid basis for a racial and ethnic classification. See Croson, 488 U.S. at 497 (citing Wygant, 476 U.S. at 276 (plurality opinion)); see also Wygant, 476 U.S. at 288 n* (O'Connor, J., concurring).

Diversification of the health services profession was one of the stated predicates of the racial and ethnic classifications in the medical school admissions program at issue in Bakke. The asserted independent goal was "improving the delivery of health-care services to communities currently underserved." Bakke, 438 U.S. at 310. Justice Powell said that "[i]t may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." Id. The

[33] See also Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) ("The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.").

problem in Bakke, however, was that there was "virtually no evidence" that the preference for minority applicants was "either needed or geared to promote that goal." Id. [34]

Assuming that some nonremedial objectives remain a legitimate basis for affirmative action after Adarand, there is a question of the nature of the showing that may be necessary to support racial and ethnic classifications that are premised on such objectives. In higher education, the link between the diversity of the student body and the diversity of viewpoints on the campus does not readily lend itself to empirical proof. Justice Powell did not require any such evidence in Bakke. He said that the strong First Amendment protection of academic freedom that allows "a university to make its own judgments as to education includes the selection of its student body." Bakke, 438 U.S. at 312. A university is thus due some discretion to conclude that a student "with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." Id. at 314.

It could be said that this thesis is rooted in a racial stereotype, one that presumes that members of racial and ethnic minority groups have a "minority perspective" to convey. As Justice O'Connor stated in Croson, a driving force behind strict scrutiny is to ensure that racial and ethnic classifications are not motivated by "stereotype." Croson, 488 U.S. at 493 (plurality opinion). There are sound arguments to support the contention that seeking diversity in higher education rests on valid assumptions. The thesis does not presume that all individuals of a particular race or ethnic background think and act alike. Rather, it is premised on what seems to be a common sense proposition that in the aggregate, increasing the diversity of the student body is bound to make a difference in the array of perspectives communicated at a university. See Metro Broadcasting, 497 U.S. at 579 ("The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Bakke that greater admission of minorities would contribute, on average, to the robust exchange of ideas.") (internal quotations omitted). Nonetheless, after Croson and Adarand, a court might demand some proof of a nexus between the diversification of the student body and the diversity of viewpoints expressed on the campus.[35] Likewise, a court may demand a factual predicate to support the proposition that greater diversity in a law enforcement agency will serve the operational needs of the agency

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[34] Aside from the proffered justification in Bakke, the government may have other reasons for seeking to increase the number of minority health professionals.

[35] Justice Powell cited literature on this subject in support of his opinion in Bakke. See 438 U.S. at 312-13 n.48, 315 n.50.

and improve its performance,[36] or that minority health care professionals are more likely to work in medically underserved communities.[37]

B. Narrow Tailoring Test

In addition to advancing a compelling goal, any governmental use of race must also be "narrowly tailored." There appear to be two underlying purposes of the narrow tailoring test: first, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking; and, second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable. As it has been applied by the courts, the factors that typically make up the "narrow tailoring" test are as follows: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (iii) the manner in which is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the program. In Adarand, the Supreme Court referred to its previous affirmative action decisions for guidance on what the narrow tailoring test entails. It specifically mentioned that when the Tenth Circuit reviewed the DOT program at issue in Adarand under intermediate scrutiny, it had not addressed race-neutral alternatives or the duration of the program.

Before describing each of the components, three general points about the narrow tailoring test deserve mention. First, it is probably not the case that an affirmative action measure has to satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors are not relevant in every case. For example, the objective of the program may determine the applicability or weight to be given a factor. The factors may play out differently where a program is nonremedial.

Third, the narrow tailoring test should not necessarily be viewed in isolation from the compelling interest test. To be sure, the inquiries are distinct: as indicated above, the compelling interest inquiry focuses on the ends of an affirmative action measure, whereas the

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[36] See Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 215 (4th Cir. 1993) (although the use of racial classifications to foster diversity of police department could be a constitutionally permissible objective, city failed to show a link between effective law enforcement and greater diversity in the department's ranks).

[37] See Bakke, 438 U.S. at 311 (opinion of Powell, J.) (noting lack of empirical data to support medical school's claim that minority doctors will be more likely to practice in a disadvantaged community).

narrow tailoring inquiry focuses on the means. However, as a practical matter, there may be an interplay between the two. There is some hint of this in Croson. In several places, the Court said that the weak predicate of discrimination on which Richmond acted could not justify the adoption of a rigid racial quota -- which suggests that if Richmond had opted for some more flexible measure the Court might have been less demanding when reviewing the evidence of discrimination. By the same token, the more compelling the interest, perhaps less narrow tailoring is required. For example, in Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986), and United States v. Paradise, 480 U.S. 149 (1987), the Supreme Court upheld what on their face appear to be rather rigid classifications to remedy egregious and persistent discrimination.

However, it bears emphasizing that the Supreme Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests. It is also far from clear that the Court in Croson would have found that a more flexible MBE program, supported by the generalized evidence of discrimination on which Richmond relied, could withstand strict scrutiny. In addition, the membership of the Court has changed dramatically in the years since Sheet Metal Workers and Paradise. Both cases were decided by five-four margins, and only one member of the majority (Justice Stevens) remains. And while Justice O'Connor agreed with the majority in Sheet Metal Workers and Paradise that ample evidence of deeply entrenched discrimination gave rise to a very weighty interest in race-based action, she dissented on the ground that the particular remedies selected were too rigid.

1. Race-Neutral Alternatives

In Croson, the Supreme Court said that the Richmond MBE program was not "narrowly tailored," in part because the city apparently had not considered race-neutral means to increase minority participation in contracting before adopting its race-based measure. The Court reasoned that because minority businesses tend to be smaller and less-established, providing race-neutral financial and technical assistance to small and/or new firms and relaxing bonding requirements might achieve the desired remedial results in public contracting -- increasing opportunities for minority businesses. 488 U.S. at 507, 510. Justice Scalia suggested an even more aggressive idea: "adopt a preference for small businesses, or even for new businesses -- which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have a racially disproportionate impact, but they are not based on race." Id. at 526 (Scalia, J., concurring). As such, they would not be subjected to strict scrutiny.

The Court in Croson did not specify the extent to which governments must consider race-neutral measures before resorting to race-conscious action. It would seem that the [redacted] but only give them serious

[redacted].[38] This principle would comport with the purposes of ensuring that race-based remedies are used only when, after careful consideration, a government has concluded that less intrusive means would not work. It also comports with Justice Powell's view that in the remedial setting, the government need not use the "least restrictive means" where they would not accomplish the desired ends as well. See Fullilove, 448 U.S. at 508 (Powell, J., concurring); see also Wygant, 476 U.S. at 280 n.6 (plurality opinion of Justice Powell) (narrow tailoring requirement ensures that "less restrictive means" are used when they would promote the objectives of a racial classification "about as well") (internal quotations omitted).[39]

This approach gives the government a measure of discretion in determining whether its objectives could be accomplished through some other avenue. In addition, under this approach, the government may not be obliged to consider race-neutral alternatives every time that it adopts a race-conscious measure in a particular field. In some situations, the government may be permitted to draw upon a previous consideration of race-neutral alternatives that it undertook prior to adopting some earlier race-based measure.[40] In the absence of prior experience, however, a government should consider race-neutral alternatives at the time it adopts a racial or ethnic classification. More fundamentally, even where race-neutral alternatives were considered, a court might second-guess the government if the court believes that an effective race-neutral alternative is readily available and hence should have been tried. See Metro Broadcasting, 497 U.S. at 625 (O'Connor, J., dissenting) (FCC affirmative action programs are not narrowly tailored, in part, because "the FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, and it has employed race-conscious means before adopting readily available race-neutral, alternative means"); United States v. Paradise, 480 U.S. at 199-200 (O'Connor, J., dissenting) (district court's race-based remedial order was not narrowly tailored because the court "had available several alternatives" that would have achieved the objectives in a less intrusive manner).[41]

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[38] See Coral Constr. King County, 941 F.2d at 923 ("[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.").

[39] Cf. Billish v. City of Chicago, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] Croson requires"), cert. denied, 114 S. Ct. 290 (1993).

[40] See Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1009 n.18.

[41] See also Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (city should have implemented race-neutral alternative of establishing non-discriminatory selection procedures in police and fire departments instead of adopting race-based procedures; "continued use of discriminatory tests. . . compounded the very evil that [race-based measures] were designed to eliminate"); Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (remanding to lower court, in part, because evidence suggested that the city should have used obvious set of race-neutral alternatives before resorting to race-

2. Scope of Program/Administrative Waivers

Justice O'Connor's opinion for the Court in Croson criticized the scope of Richmond's thirty percent minority subcontracting requirement, calling it a "rigid numerical quota" that did not permit consideration, through some form of administrative waiver mechanism, of whether particular individuals benefiting from the ordinance had suffered from the effects of the discrimination that the city was seeking to remedy. 488 U.S. at 508. At first blush, this criticism of the Richmond plan may appear to conflict with previous Court decisions, joined by Justice O'Connor, that held that race-based remedial measures need not be limited to persons who were the victims of discrimination. (See supra p. 5.) Upon closer reading, however, Croson should not be interpreted as introducing a "victims-only" requirement through the narrow tailoring test.[42] The Court's rejection in Adarand of Justice Scalia's position that compensation is due only to individuals who have been discriminated against personally provides further confirmation that Croson did not impose any such requirement.

The Court's focus in Croson on individualized consideration of persons seeking the benefit of a racial classification appears to have been animated by three separate concerns about the scope of the Richmond plan. First, the Court indicated that in order for a remedial affirmative action program to be narrowly tailored, its beneficiaries must be members of groups that were the victims of discrimination. The Court faulted the Richmond plan because it was intended to remedy discrimination against African-American contractors, but included among its beneficiaries Hispanics, Asian-Americans, Native-Americans, Eskimos, and Aleuts -- groups for which Richmond had proffered "absolutely no evidence of past discrimination." Id. at 506. Therefore, the Court said, even if the Richmond MBE program was "'narrowly tailored' to compensate African-American contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?" Id.[43] Second, the Court said that the Richmond plan was not even narrowly tailored to remedy discrimination against black

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conscious measures).

[42] Most lower courts have not construed Croson in that fashion. See, e.g., Billish v City of Chicago, 962 F.2d 1269, 1292-94 (7th Cir. 1992), rev'd on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); Coral Constr. Co. v. King County, 941 F.2d at 925-26 n.15; Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990). But see Winter Park v. FCC, 873 F.2d 347, 367-68 (D.C. Cir. 1989) (Williams, J., concurring in part and dissenting in part) (interpreting Croson as requiring that racial classifications be limited "to victims of prior discrimination"); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1347, 1362 (E.D. Pa. 1989) (MBE program not narrowly tailored, in part, because it "containe[d] no provision to identify those who were victims of past discrimination and to limit the program's benefits to them").

[43] See O'Donnell Constr. Co. v. District of Columbia, 963 F.2d at 427 (MBE program was not narrowly tailored because of "random inclusion of racial groups for which there was no evidence of past discrimination").

contractors because "a successful black entrepreneur . . . from anywhere in the country" could reap its benefits. Id. at 508. That is, the geographic scope of the plan was not sufficiently tailored.[44] Third, the Court contrasted the "rigidity" of the Richmond plan with the flexible waiver mechanism in the ten percent minority participation requirement that was upheld in Fullilove. As the Court in Croson described it, the requirement in Fullilove could be waived where a minority business charged a "higher price [that] was not attributable to the effects of past discrimination." Id. See Fullilove, 448 U.S. at 488 (plurality opinion). The theory is that where a business is struggling to overcome discrimination, it may not have the capacity to submit a competitive bid. That an effective waiver provision allows for "individualized consideration" of a particular minority contractor's bid does not mean that the contractor has to be a "victim" of a specific instance of discrimination. It does mean that if the contractor is wealthy and has entered the mainstream of contractors in the community, a high bid might not be traceable to the discrimination that a racial or ethnic classification is seeking to redress. Instead, such a bid might reflect an effort to exploit the classification.[45]

3. Manner in Which Race is Used

The Court's attack on the "rigidity" of the Richmond ordinance also implicates another common refrain in affirmative action jurisprudence: the manner in which race is used is an integral part of the narrow tailoring requirement. The clearest statement of the Court's somewhat mixed messages in this area is that programs that make race or ethnicity a requirement of eligibility for particular positions or benefits are less likely to survive constitutional challenge than programs that merely use race or ethnicity as one factor to be considered under a program open to all races and ethnic groups.[46]

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[44] Compare Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d at 1418 (MBE program intended to remedy discrimination against minorities in county construction industry was narrowly tailored, in part, because scope of beneficiaries was limited to minorities within the county) with Podberesky v. Kirwan, 38 F.3d 147, 159 (4th Cir.) (scholarship program intended to remedy discrimination against African-Americans in Maryland was not narrowly tailored, in part, because African-Americans from outside Maryland were eligible for the program), cert. denied, 115 S. Ct. 2001 (1995).

[45] See Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 425 (7th Cir.) (noting that administrative waiver mechanism enabled state to exclude from scope of beneficiaries of affirmative action plan in public contracting "two wealthy black football players" who apparently could compete effectively outside the plan), cert. denied, 500 U.S. 954 (1991); Concrete General, Inc. v. Washington Suburban Sanitary Comm'n, 779 F. Supp. 370, 381 (D. Md. 1991) (MBE program not narrowly tailored, in part, because it had "no provision to 'graduate' from the program those contracting firms which have demonstrated the ability to effectively compete with non-MBE's in a competitive bidding process"); see also Shurberg Broadcasting, Inc. v. FCC, 876 F.2d at 916 (opinion of Silberman, J.) ("There must be some opportunity to exclude those individuals for whom affirmative action is just another business opportunity.").

[46] The factor that we labeled above as "scope of beneficiaries/administrative waivers" is sometimes considered by courts under the heading of "flexibility", along with a consideration of the manner in which race is used. For the sake of clarity we have divided them into two separate components of the narrow

Two types of racial classifications are subject to criticism as being too rigid. First and most obvious is an affirmative action program in which a specific number of positions are set aside for minorities. The prime example is the medical school admissions program that the Court invalidated in Bakke. Justice Powell's pivotal opinion in the case turned squarely on the fact that the program reserved sixteen percent of the slots at the medical school for members of racial and ethnic minority groups. Another example of this type of classification is the program upheld in Fullilove. It provides that, except where the Secretary of Commerce determines otherwise, at least ten percent of the amount of federal grants for certain public works projects must be expended by grantees to purchase goods or services from minority-owned businesses. 42 U.S.C. § 6705(f)(2).

The second type of classification that is vulnerable to attack on flexibility grounds is a program in which race or ethnicity is the sole or primary factor in determining eligibility. One example is the FCC's "distress sale" program, which allows a broadcaster whose qualifications have been called into question to transfer his or her license prior to an FCC revocation hearing, provided the transferee is a minority-owned business.[47] Another example of affirmative action programs in which race or ethnicity is a requirement of eligibility are college scholarships that are reserved for minorities.[48]

Under both types of classifications, persons not within the designated categories are rendered ineligible for certain benefits or positions.[49] Justice Powell's opinion in Bakke

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tailoring test.

[47] The distress sale program was upheld under intermediate scrutiny in Metro Broadcasting.

[48] There is a plausible distinction between college scholarships that are reserved for minorities and admissions quotas that reserve places at a college for minorities. In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir 1994), cert. denied, 115 S. Ct. 2001 (1995), the Fourth Circuit held that a college scholarship program for African Americans was unconstitutional under Croson. The Fourth Circuit's decision, however, did not equate the scholarship program with the admissions quota struck down in Bakke, and it did not turn on the fact that race was a requirement of eligibility for the program.

[49] The statutes and regulations under which DOT has established the contracting program at issue in Adarand are different. Racial and ethnic classifications are used in the form of a presumption that members of minority groups are "socially disadvantaged." However, that presumption is rebuttable, and members of nonminority groups are eligible for the program "on the basis of clear and convincing evidence" that they are socially disadvantaged. Adarand, 63 U.S.L.W. at 4524. See id. at 4540 (Stevens, J., dissenting) (arguing that the relevant statutes and regulations in Adarand are better tailored than the Fullilove legislation, because they "do[] not make race the sole criterion of eligibility for participation in the program." Members of racial and ethnic are presumed to be disadvantaged, but the presumption is rebuttable, and even if it does not get the presumption, "a small business may qualify [for the program] by showing that it is both socially and economically disadvantaged").

rested on the fact that the admissions program at issue was a quota that saved places for minorities solely on the basis of their race.[50] As Justice Powell put it, such a program

> tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

438 U.S. at 319. Justice Powell contrasted admissions programs that require decisions based "solely" on race and ethnicity, id. at 315, with programs in which race or ethnic background is simply one factor among many in the admissions decision. Justice Powell said that in the latter type of program, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Id. at 317. In Justice Powell's view, such programs are sufficiently flexible to meet the narrow tailoring requirement.

This line of reasoning also resonates in Johnson v. Transportation Agency, 480 U.S. 616 (1987). There, the Supreme Court upheld an affirmative action plan under which a state government agency considered the gender of applicants[51] as one factor in making certain promotion decisions. The Court noted that the plan "set[] aside no positions for women," but simply established goals for female representation that were not "construed" by the agency as "quotas." Id. at 638. The Court further observed that the plan "merely authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." Id. The Court stressed that in the promotion decision in question, "sex . . . was but one of numerous factors [that were taken] into account." Id. The agency's plan "thus resemble[d]" the type of admissions program "approvingly noted by Justice Powell" in Bakke: it "requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." Id. See also id. at 656-57 (O'Connor, J., concurring in judgment) (agency's promotion decision was not made "solely on the basis of sex;" rather, "sex was simply used as a 'plus factor'").

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[50] Bakke is the only Supreme Court affirmative action case that ultimately turned on the "quota" issue. In Croson, the Court referred disparagingly to the thirty percent minority subcontracting requirement at issue in the case as a "quota," but that was not in itself the basis for the Court's decision.

[51] Although Johnson was a Title VII gender classification case, its reasoning as to the distinction between quotas and goals is instructive with respect to the constitutional analysis of racial and ethnic classifications.

Finally, Croson itself touches on the point. The Court said that in the absence of a waiver mechanism that permitted individualized consideration of persons seeking a share of city contracts pursuant to the requirement that thirty percent of the dollar value of prime contracts go to minority subcontractors, the Richmond plan was "problematic from an equal protection standpoint because [it made] the color of an applicant's skin the sole relevant consideration." 488 U.S. at 508.

4. Comparison of Numerical Target to Relevant Market

Where an affirmative action program is justified on remedial grounds, the Court has looked at the size of any numerical goal and its comparison to the relevant labor market or industry. This factor involves choosing the appropriate measure of comparison. In Croson, Richmond defended its thirty percent minority subcontracting requirement on the premise that it was halfway between .067 percent -- the percentage of city contracts awarded to African-Americans during the years 1978-83 -- and 50 percent -- the African-American population of Richmond. The Court in Croson demanded a more meaningful statistical comparison and much greater mathematical precision. It held that numerical figures used in a racial preference must bear a relationship to the pool of qualified minorities. Thus, in the Court's view, the thirty percent minority subcontracting requirement not narrowly tailored, because it was tied to the African-American population of Richmond, and as such, rested on the assumption that minorities will choose a particular trade "in lockstep proportion to their representation in the local population." 488 U.S. at 507.[52]

5. Duration and Periodic Review

Under Croson, affirmative action represents a "temporary" deviation from "the norm of equal treatment of all racial and ethnic groups." Croson, 488 U.S. at 510. A particular measure therefore should last only as long as it is needed. See Fullilove, 448 U.S. at 513 (Powell, J., concurring). Given this imperative, a racial or ethnic classification is more likely to pass the narrow tailoring test if it has a definite end-date,[53] or is subject to

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[52] Compare Aiken v. City of Memphis, 37 F.3d at 1165 (remanding to lower court, in part, because race-based promotion goals in consent decree were tied to "undifferentiated" labor force statistics; instructing district court on remand to determine whether racial composition of city labor force "differs materially from that of the qualified labor pool for the positions" in question) with Edwards v. City of Houston, 37 F.3d 1097, 1114 (5th Cir. 1994) (race-based promotion goals in city police department were narrowly tailored, in part, because the goals were tied to the number of minorities with the skills for the positions in question), reh'g granted, 49 F.3d 1048 (5th Cir. 1995).

[53] See Paradise, 480 U.S. at 178 (plurality opinion) (race-based promotion requirement was narrowly tailored, in part, because it was "ephemeral," and would "endure[] only until" non-discriminatory promotion procedures were implemented); Sheet Metal Workers, 478 U.S. at 487 (Powell, J., concurring) (race-based hiring goal was narrowly tailored, in part, because it "was not imposed as a permanent requirement, but [was] of limited duration"); Fullilove, 448 U.S. at 513 (Powell, J., concurring) (race-based classification in public works legislation was narrowly tailored, in part, because it was "not a

meaningful periodic review that enables the government to ascertain the continued need for the measure. The Supreme Court has said that a set end-date is less important where a program does not establish specific numerical targets for minority participation. Johnson, 480 U.S. at 640. However, it remains important for such a program to undergo periodic review. See id. at 639-40.

Simply put, a racial or ethnic classification that was justified at the point of its adoption may no longer be required at some future point. If the classification is subject to reexamination from time to time, the government can react to changed circumstances by fine-tuning the classification, or discontinuing it if warranted. See Fullilove, 448 U.S. at 489 (plurality opinion); see also Metro Broadcasting, 497 U.S. at 594; Sheet Metal Workers, 478 U.S. at 478 (plurality opinion); id. at 487-88 (Powell, J., concurring).

6. Burden

Affirmative action necessarily imposes a degree of burden on persons who do not belong to the groups that are favored by a racial or ethnic classification. The Supreme Court has said, however, that some burdens are acceptable, even when visited upon individuals who are not personally responsible for the particular problem that the classification seeks to address. See Wygant, 476 U.S. at 280-81 (plurality opinion) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."). This was implicitly reaffirmed in Croson and Adarand: in both cases, the Court "recognize[d] that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be,"[54] but declined to hold that the imposition of that burden pursuant to an affirmative action measure is automatically unconstitutional.

In some situations, however, the burden imposed by an affirmative action program may be too high. As a general principle, a racial or ethnic classification crosses that threshold when it "unsettle[s] . . . legitimate, firmly rooted expectation[s],"[55] or imposes the "entire burden . . . on particular individuals."[56] Applying that principle in an employment case where seniority differences between minority and nonminority employees were involved, a plurality of the Court in Wygant stated that race-based layoffs may impose a more substantial burden than race-based hiring and promotion goals, because "denial of a

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permanent part of federal contracting requirements"); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d at 428 (ordinance setting aside a percentage of city contracts for minority businesses was not narrowly tailored, in part, because it contained no "sunset provision" and no "end [was] in sight").

[54] Adarand, 63 U.S.L.W. at 4531 (citing Croson).

[55] Johnson, 480 U.S. at 638.

[56] Sheet Metal Workers, 478 U.S. at 488 (Powell, J., concurring).

future employment opportunity is not as intrusive as loss of an existing job." Wygant, 476 U.S. at 282-83; see also id. at 294 (White, J., concurring). In a subsequent case, however, Justice Powell warned that "it is too simplistic to conclude that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue." Sheet Metal Workers, 478 U.S. at 488 n.3 (Powell, J., concurring).

In the contracting area, a racial or ethnic classification would upset settled expectations if it impaired an existing contract that had been awarded to a person who is not included in the classification. This apparently occurs rarely, if at all, in the federal government. A more salient inquiry therefore focuses on the scale of the exclusionary effect of a contracting program. For example, in Fullilove, Justice Powell thought it salient that the contracting requirement at issue in the case reserved for minorities a very small amount of total funds for construction work in the nation (less than one percent), leaving nonminorities able to compete for the vast remainder. For Justice Powell, this rendered the effect of the program "limited and so widely dispersed that its use is consistent with fundamental fairness." Fullilove, 448 U.S. at 515. In some instances, conversely, the exclusionary effect of racial classifications in contracting may be considered too large. For example, the lower court in Croson held that Richmond's thirty percent minority subcontracting requirement imposed an impermissible burden because it placed nonminorities at a great "competitive disadvantage." J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1361 (4th Cir. 1987). Similarly, an affirmative action program that effectively shut nonminority firms out of certain markets or particular industries might establish an impermissible burden. For example, the dissenters in Metro Broadcasting felt that the FCC's distress sale unduly burdened nonminorities because it "created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside . . . . For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity." 497 U.S. at 630 (O'Connor, J., dissenting). The dissenters also dismissed the majority's contention that the impact of distress sales on nonminorities was minuscule, given the small number of stations transferred through those means. The dissenters said that "[i]t is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate." Id.

C. The Post-Croson Landscape at the State and Local Level

Croson has not resulted in the end of affirmative action at the state and local level. There is no doubt, however, that Croson, in tightening the constitutional parameters, has diminished the incidence of such programs, at least in contracting and procurement. The post-Croson experience of governments that continue to operate affirmative action programs

in that area is instructive.[57] Many governments reevaluated their MBE programs in light of Croson, and modified them to comport with the applicable standards. Typically, the centerpiece of a government's efforts has been a "disparity study," conducted by outside experts, to analyze patterns and practices in the local construction industry. The purpose of a disparity study is to determine whether there is evidence of discrimination against minorities in the local construction industry that would justify the use of remedial racial and ethnic classifications in contracting and procurement. Some studies also address the efficacy of race-neutral alternatives. In addition to obtaining a disparity study, some governments have held public hearings in which they have received evidence about the workings of the local construction industry.

Post-Croson affirmative action programs in contracting and procurement tend to employ flexible numerical goals and/or bidding preferences in which race or ethnicity is a "plus" factor in the allocation decision, rather than a hard set-aside of the sort at issue in Croson. It appears that many of the post-Croson contracting and procurement programs that rest on disparity studies have not been challenged in court.[58] At least one of the programs was sustained in litigation.[59] Another was struck down as inconsistent with the Croson standards.[60] Challenges to other programs were not resolved on summary judgment, and

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[57] A comprehensive review of voluntary affirmative action in public employment at the state and local level after Croson is beyond the scope of this memorandum. We note that a number of the programs have involved remedial racial and ethnic classifications in connection with hiring and promotion decisions in police and fire departments. Some of the programs have been upheld, and others struck down. Compare Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) (upholding race-based hiring goal in county fire department under Croson) with Long v. City of Saginaw, 911 F.2d 1192 (6th Cir. 1990) (striking down race-based hiring goal in city police department under Croson and Wygant).

[58] That has been true in Richmond. It is our understanding that the city conducted a post-Croson disparity study and enacted a new MBE program that establishes a bidding preference of "20 points" for prime contractors who pledge to meet a goal of subcontracting sixteen percent of the dollar value of a city contract to MBEs. The program works at the "prequalification" stage, when the city is determining its pool of eligible bidders on a project. Once the pool is selected, the low bidder is awarded the contract.

[59] See Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).

[60] Associated Gen. Contractors v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992), vacated on mootness grounds, 41 F.3d 62 (2d Cir. 1994).

were remanded for further fact finding.[61] Contracting and procurement programs that were not changed after Croson have met with a mixed reception in the courts.[62]

III. Application of the Croson Standards at the Federal Level

In essence, Adarand federalizes Croson, with one important caveat: Congress may be entitled to some deference when it acts on the basis of race or ethnicity to remedy the effects of discrimination. The Court in Adarand hinted that at least where a federal affirmative action program is congressionally mandated, the Croson standards might apply somewhat more loosely. The Court concluded that it need not resolve whether and to what extent the judiciary should pay special deference to Congress in this area. The Court did, however, cite the opinions of various Justices in Fullilove, Croson, and Metro Broadcasting concerning the significance of Congress' express constitutional power to enforce the antidiscrimination guarantees of the Thirteenth and Fourteenth Amendments -- under Section 2 of the former and Section 5 of the latter -- and the extent to which courts should defer to exercises of that authority that entail the use of racial and ethnic classifications to remedy discrimination. See 63 U.S.L.W. at 4531. Some of those opinions indicate that even under strict scrutiny, Congress does not have to make findings of discrimination with the same degree of precision as a state or local government, and that Congress may be entitled to some latitude with respect to its selection of the means to the end of remedying discrimination.[63]

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[61] Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); Concrete Works v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995). The courts in these two cases commented favorably on aspects of the programs at issue and the disparity studies by which they are justified.

[62] We are aware of at least one such program that survived a motion for summary judgment and apparently is still in effect today. See Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983 (1990). Others have been invalidated. See, e.g., O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); Contractors' Assoc. v. City of Philadelphia, WL 11900 (E.D. Pa. Jan. 11, 1995); Arrow Office Supply Co. v. City of Detroit, 826 F. Supp. 1072 (E.D. Mich. 1993); F. Buddie Constr. Co. v. City of Elyria, 773 F. Supp. 1018 (N.D. Ohio 1991); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349 (E.D. Pa. 1989).

[63] Section 1 of the Fourteenth Amendment prohibits states and municipalities from denying persons the equal protection of the laws. Section 5 gives Congress the power to enforce that prohibition. Because Section 1 of the Fourteenth Amendment only applies to states and municipalities, see United States v. Guest, 383 U.S. 745, 755 (1966), it is uncertain whether Congress may act under Section 5 of that amendment to remedy discrimination by purely private actors. See Adarand, 63 U.S.L.W. at 4538 n.10 (Stevens, J., dissenting) ("Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's applicability to pure regulation of private individuals."); Metro Broadcasting, 497 U.S. at 605 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials."). Nevertheless, remedial legislation adopted under Section 5 of the Fourteenth Amendment does not necessarily have to act on the states directly. Indeed, when Congress

In Fullilove, Justice Powell's concurring opinion said that even under strict scrutiny, "[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." Fullilove, 448 U.S. at 515 n.14 (Powell, J., concurring). It was therefore of paramount importance to Justice Powell that the racial and ethnic classification in Fullilove was prescribed by Congress, which, Justice Powell admonished, "properly may -- and indeed must -- address directly the problems of discrimination in our society." Id. at 499. Justice Powell emphasized that Congress has "the unique constitutional power" to take such action under the enforcement clauses of the Thirteenth and Fourteenth Amendments. Id. at 500. See id. at 483 (plurality opinion) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees."). Justice Powell observed that when Congress uses those powers, it can paint with a broad brush, and can devise national remedies for the national problem of racial and ethnic discrimination. Id. at 502-03 (Powell, J., concurring). Furthermore, Justice Powell said that through repeated investigation of that problem, Congress has developed familiarity with the nature and effects of discrimination: "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Id. at 503. Because Congress need not redocument the fact and history of discrimination each time it contemplates adopting a new remedial measure, the findings that supported the Fullilove legislation were not restricted to the actual findings that Congress made when it enacted that measure. Rather, the record included "the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." Id. A court reviewing a race-based remedial act of Congress therefore "properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against [minorities]." Id. Finally, Justice Powell gave similar deference to Congress when it came to applying the narrow tailoring test. He said that in deciding how best to combat discrimination in the country, the "Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a . . . measure of discretion to choose a suitable remedy." Id. at 508.

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seeks to remedy discrimination by private parties, it may be indirectly remedying discrimination of the states; for in some cases, private discrimination was tolerated or expressly sanctioned by the states. Private discrimination, moreover, often can be remedied under the enforcement provisions of the Thirteenth Amendment. Section 1 of that amendment prohibits slavery and involuntary servitude. Section 2 gives Congress the power to enforce that prohibition by passing remedial legislation designed to eliminate "the badges and incidents of slavery in the United States." Jones v. Alfred Mayer Co., 392 U.S. 409, 439 (1968). The Supreme Court has held that such legislation may be directed at remedying the discrimination of private actors, as well as that of the states. Id. at 438. See also Runyon v. McCrary, 427 U.S. 160, 179 (1976). In Fullilove, the plurality opinion concluded that the Commerce Clause provided an additional source of power under which Congress could adopt race-based legislation intended to remedy the discriminatory conduct of private actors. See Fullilove, 448 U.S. at 475 (plurality opinion).

Justice O'Connor's opinion in Croson is very much in the same vein. She too commented that Congress possesses "unique remedial powers . . . under § 5 of the Fourteenth Amendment." Croson, 488 U.S. at 488 (plurality opinion) (citing Fullilove, 448 U.S. at 483 (plurality opinion)). By contrast, state and local governments have "no specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," but rather are subject to its "explicit constraints." Id. at 490 (plurality opinion). Therefore, in Justice O'Connor's view, state and local governments "must identify discrimination, public or private, with some specificity before they may use race-conscious relief." Id. at 504. Congress, on the other hand, can make, and "has made national findings that there has been societal discrimination in a host of fields." Id. It may therefore "identify and redress the effects of society-wide discrimination" through the use of racial and ethnic classifications that would be impermissible if adopted by a state or local government. Id. at 490 (plurality opinion).[44] Justice O'Connor cited her Croson opinion and reiterated these general points about the powers of Congress in her Metro Broadcasting dissent. See 497 U.S. at 605 (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its unique remedial powers . . . under § 5 of the Fourteenth Amendment.") (internal quotations omitted).

It would be imprudent, however, to read too much into Justice Powell's opinion in Fullilove and Justice O'Connor's opinion in Croson. They do not, for example, support the proposition that Congress may simply assert that because there has been general societal discrimination in this country, legislative classifications based on race or ethnicity are a necessary remedy. The more probable construction of those opinions is that Congress must have some particularized evidence about the existence and effects of discrimination in the sectors and industries for which it prescribes racial or ethnic classifications. For example, Congress established the Fullilove racial and ethnic classification to remedy what the Court saw as the well-documented effects of discrimination in one industry -- construction -- that had hindered the ability of minorities to gain access to public contracting opportunities. See Fullilove, 448 U.S. at 505-06 (Powell, J., concurring); see also id. at 473 (plurality opinion).

Based on this reading of Croson and Fullilove, the endorsement in Adarand of strict scrutiny of federal affirmative action programs does not mean that Congress must find discrimination in every jurisdiction or industry affected by such a measure (although it is unclear whether, as a matter of narrow tailoring, the scope of a classification should be narrowed to exclude regions and trades that have not been affected by the discrimination that is to be remedied.). State and local governments must identify discrimination with some precision within their jurisdictions; Congress' jurisdiction is the nation as a whole. But after Adarand, Congress is subject to the Croson "strong basis in evidence" standard. Under that standard, the general history of racial discrimination in the nation would not be a sufficient

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[44] Justices Kennedy and Scalia declined to join that part of Justice O'Connor's opinion in Croson that drew a distinction between the respective powers of Congress and state or local governments in the area of affirmative action.

predicate for a remedial racial or ethnic classification. In addition, evidence of discrimination in one sector or industry is not always probative of discrimination in other sectors and industries. For example, a history of lending discrimination against minorities arguably cannot serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy; application of the narrow tailoring test would suggest that if lending discrimination is the problem being addressed, then the government should tackle it directly.[65]

Furthermore, under the new standard, Congress probably does not have to hold a hearing or draft a report each time it adopts a remedial racial or ethnic classification. But where such a classification rests on a previous law or series of laws, those earlier measures must be supported by sufficient evidence of the effects of discrimination. And if the findings in the older laws are stale, Congress or the pertinent agency may have to demonstrate the continued relevance of those findings; this would satisfy the element of the narrow tailoring test that looks to the duration of classifications and whether they are subject to reevaluation. Where the record is sparse, Congress or the relevant agency may have to develop it. That endeavor may involve the commissioning of disparity studies of the type that state and local governments around the country undertook after Croson to demonstrate that remedial racial and ethnic classifications in public contracting are warranted. Together, the myriad state and local studies may provide an important source of evidence supporting the use by the federal government of national remedial measures in certain sectors of the economy.

Whatever deference a court might accord to federal remedial legislation after Adarand, it is undecided whether the same degree of deference would be accorded to nonremedial legislation. In Metro Broadcasting, the majority gave substantial deference to congressional judgments regarding the need for diversity in broadcasting and the linkage between the race of a broadcaster and programming output. Metro Broadcasting, 497 U.S. at 566, 572-73, 591 n.43. The dissenters did not do so, precisely because the classifications were nonremedial and hence, in their view, did not implicate Congress' powers under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. Id. at 605, 628-29 (O'Connor, J., dissenting).

Finally, many existing federal affirmative action programs are not specifically mandated by Congress. Courts are unlikely to accord federal agencies acting without a congressional mandate the same degree of deference accorded judgments made by Congress itself. Agencies do not have the "institutional competence" and explicit "constitutional

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[65] Patterns and practices of bank lending to minorities, may, however, reflect a significant "secondary effect" of discrimination in particular sectors and industries, i.e., because of that discrimination, minorities cannot accumulate the necessary capital and achieve the community standing necessary to qualify for loans.

authority" that Congress possesses. Adarand, 63 U.S.L.W. at 4538 (Stevens, J., dissenting).[46] Although some existing agency programs were not expressly mandated in the first instance in legislation, they may nonetheless be viewed by a court as having been mandated by Congress through subsequent congressional action. For example, in Metro Broadcasting, the programs at issue were established by the FCC on its own; Congress' role was limited to FCC oversight hearings and the passage of an appropriations riders that precluded the FCC from using any funds to reconsider or cancel its programs. 497 U.S. at 572-79. The majority concluded that this record converted the FCC programs into measures that had been "specifically approved -- indeed, mandated by Congress." Id. at 563.

Under strict scrutiny, it is uncertain what level of congressional involvement is necessary before a court will review an agency's program with deference. What may be required is evidence that Congress plainly has brought its own judgment to bear on the matter. Cf. Adarand, 63 U.S.L.W. at 4537 (Stevens, J., dissenting) ("An additional reason for giving greater deference to the National Legislature than to a local law-making body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives . . . .") (emphasis added); id. at 4538 (Stevens, J., dissenting) ("Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.") (emphasis added).

IV. Conclusion

Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation. The information gathered by many agencies in connection with the President's recent review of federal affirmative action programs should prove helpful in this regard. In addition, appended to this memo is a nonexhaustive checklist of questions that provides initial guidance as to what should be considered in that review process. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any given program.

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[46] See Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1540 n.3 (W.D. Wisc. 1989) (noting that for purposes of judicial review of affirmative action measures, there is a distinction between congressionally mandated measures and those that are "independently established" by a federal agency), aff'd, 922 F.2d 419 (7th Cir.), cert. denied, 500 U.S. 954 (1991); cf. Bakke, 438 U.S. at 309 (opinion of Powell, J.) (public universities, like many "isolated segments of our vast governmental structure are not competent to make [findings of national discrimination], at least in the absence of legislative mandates and legislatively determined criteria").

Appendix: Questions to Guide Review of Affirmative Action Programs

I. Authority

Is the use of racial or ethnic criteria as a basis for decisionmaking mandated by legislation? If not mandated, is it expressly authorized by legislation? If there is no express authorization, has there been any indication of congressional approval of an agency's action in the form of appropriations riders or oversight hearings? These questions are important, because Congress may be entitled to some measure of deference when it decides that racial and ethnic classifications are necessary.

If there is no explicit legislative mandate, authorization, or approval, is the program premised on an agency rule or regulation that implements a statute that, on its face, is race-neutral? For example, some statutes require agencies to give preferences to "disadvantaged" individuals, but do not establish a presumption that members of racial groups are disadvantaged. Such a statute is race-neutral. Other statutes, like those at issue in Adarand, require agencies to give preferences to "disadvantaged" individuals, but establish a rebuttable presumption that members of racial groups are disadvantaged. Such a statute is race-conscious, because it authorizes agencies to use racial criteria in decisionmaking.

II. Purpose

What is the objective of the program? Is it intended to remedy discrimination, to foster racial diversity in a particular sector or industry, or to achieve some other purpose? Is it possible to discern the purpose from the face the relevant statute or legislation? If not, does the record underlying the relevant legislation or regulation shed any light on the purpose of the program?

A. Factual Predicate: Remedial Programs

If the program is intended to serve remedial objectives, what is the underlying factual predicate of discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in a particular sector or industry, or a statistical underrepresentation of minorities in a sector or industry? Without more, these are impermissible bases for affirmative action. If the discrimination to be remedied is more particularized, then the program may satisfy Adarand. In assessing the nature of the factual predicate of discrimination, the following factors should be taken into account:

1. Source. Where can the evidence be found? Is it contained in findings set forth in a relevant statute or legislative history (committee reports and hearings)? Is evidence contained in findings that an agency has made on its own in connection with a rulemaking process or in the promulgation of guidelines? Do the findings expressly or implicitly rest on

findings made in connection with a previous, related program (or series of programs)?

2. Type. What is the nature of the evidence? Is it statistical or documentary? Are the statistics based on minority underrepresentation in a particular sector or industry compared to the general minority population? Or are the statistics more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the sector or industry or seek to explain what that number would look like "but for" the exclusionary effects of discrimination? Does the evidence seek to explain the secondary effects of discrimination -- for example, how the inability of minorities to break into certain industries due to historic practices of exclusion has hindered their ability to acquire the requisite capital and financing? Similarly, where health and education programs are at issue, is there evidence on how discrimination has hampered minority opportunity in those fields, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical and documentary evidence, is there testimonial or anecdotal evidence of discrimination in the record underlying the program -- for example, accounts of the experiences of minorities and nonminorities in a particular field or industry?

3. Scope. Are the findings purported to be national in character and dimension? Or do they reflect evidence of discrimination in certain regions or geographical areas?

4. "Authorship". If Congress or an agency relied on reports and testimony of others in making findings, who is the "author" of that information? The Census Bureau? The General Accounting Office? Business and trade associations? Academic experts? Economists? (There is no necessary hierarchy in assessing authorship, but the identity of the author may affect the credibility of the findings.)

5. Timing. Since the adoption of the program, have additional findings of discrimination been assembled by Congress or the agency that could serve to justify the need for the program when it was adopted? If not, can such evidence be readily assembled now? These questions go to whether "post-enactment" evidence can be marshaled to support the conclusion that remedial action was warranted when the program was first adopted.

B. Factual Predicate: Nonremedial Programs

Adarand does not directly address whether and to what extent nonremedial objectives for affirmative action may constitute a compelling governmental interest. At a minimum, to the extent that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship, and timing of underlying findings should be assessed, just as for remedial programs.